

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA, ) NO. CR04-334RSM  
Plaintiff, ) GOVERNMENT'S RESPONSE TO  
v. ) DEFENSE MOTION TO PROHIBIT  
KYLE GIANIS, ) USE OF DEPOSITIONS AT TRIAL  
Defendant. )

## I. INTRODUCTION

The United States of America respectfully submits this response to Defendant's Motion to Prohibit Use of Depositions at Trial (Dkt. # 37). The government hopes, and anticipates, that both of its Canadian witnesses, Adam Tsoukalas and David Youngberg, will appear and testify in person at trial, thereby mooting this issue.

However, if they do not appear at trial, they are “unavailable” within the meaning of Fed. R. Civ. P. 15. Moreover, Defendant has had a full and fair opportunity to confront and cross-examine the witnesses during the depositions. They are therefore useable at trial in lieu of live testimony.

## II. BACKGROUND

The basic background is set forth in the government's trial brief and other prior filings, and will not be repeated at length in the interests of brevity. Briefly, the chief

1 evidence against this defendant is the testimony of his co-conspirators, David Youngberg  
 2 and Adam Tsoukalas. Both witnesses are Canadian citizens (as is this Defendant), and  
 3 both currently reside in Canada. Both Tsoukalas and Youngberg were charged in this  
 4 Court, and ultimately agreed to cooperate and plead guilty to federal offenses.  
 5 Youngberg pleaded guilty to a misprison of a felony, in violation of Title 18,  
 6 United States Code, Section 4. He was sentenced to twenty-one months incarceration on  
 7 or about September 24, 2004, and has since been released and returned to Canada.  
 8 Tsoukalas was ultimately sentenced to sixty months incarceration. He was transferred to  
 9 Canada on or about September 25, 2007 pursuant to the Convention on the Transfer of  
 10 Sentenced Persons. Tsoukalas was recently released from custody, but remains on Parole  
 11 in Canada.

12 After Gianis' arrest and transfer to this District, the government contacted both  
 13 Youngberg (through his U.S. counsel, Nancy Tenney) and Tsoukalas (through his  
 14 mother). Youngberg indicated through counsel that he might be prepared to testify, but  
 15 was somewhat reluctant and equivocal. Tsoukalas's mother told the agent and AUSA  
 16 that her son would not cooperate.

17 The government then moved the Court to authorize the government to take  
 18 perpetuation depositions of each man pursuant to Rule 15 (Dkt. # 13). The Honorable  
 19 John C. Coughenour granted the motion over the defendant's objection in an order dated  
 20 March 18, 2008 (Dkt. # 18). The government then applied for, and received, Canadian  
 21 government assistance in scheduling and conducting the depositions pursuant to the  
 22 mutual legal assistance treaty between the two countries.

23 Both Tsoukalas and Youngberg were deposed in Vancouver, Canada on May 14  
 24 and May 15, 2008. The depositions were conducted in the Supreme Court for British  
 25 Columbia (which is the equivalent of our Federal District Court), before The Honorable  
 26 Madam Justice L. B. Gerow, who administered oaths to each witness. Defense counsel  
 27 Peter Camiel participated in person, and had the opportunity to cross-examine each  
 28 witness. Defendant was able to observe the proceedings live via video-conference link

1 from the FDC; also present with him was Peter Mair, Mr. Camiel's partner. Mr. Camiel  
 2 had the opportunity to confer with his client via telephone at breaks during his cross-  
 3 examination. Both depositions were transcribed by an American court reporter and  
 4 videotaped. During the depositions, both defendants indicated they intended to appear at  
 5 trial, if required to do so.

6 In addition, both men were served with trial subpoenas in this matter in  
 7 conjunction with their depositions, which included instructions on how to make travel  
 8 arrangements and other logistical details.

9 Since the depositions, both defendants have given conflicting information about  
 10 whether they intend to appear at trial. Both witnesses have expressed significant fear and  
 11 retaliation from the defendant and his associates if they do testify. As of the date of this  
 12 response, it is the government's belief that Tsoukalas does intend to appear in Court,  
 13 albeit reluctantly. Youngberg has indicated through his lawyer that he "prefers not to  
 14 appear," but it is unclear if he will actually fail to do so.

15 Both during the depositions, and since, the government has made it clear to both  
 16 defendants that it believes their respective plea agreements do require them to appear at  
 17 trial in person, and that a failure to do so will constitute a breach of their plea agreements.  
 18 As recently as May 27, 2008, the undersigned AUSA communicated that position to  
 19 Mr. Tsoukalas via both his mother and his Canadian Probation Officer, and to Mr.  
 20 Youngberg via Ms. Nancy Tenney, his U.S. counsel.

### 21 III. LEGAL ANALYSIS

22 Federal Rule of Criminal Procedure 15(a) provides in pertinent part:

23 Whenever due to exceptional circumstances of the case it is in  
 24 the interest of justice that the testimony of a prospective  
 25 witness of a party ***be taken and preserved for use at trial***, the  
 26 court may upon motion of such party and notice to the parties  
 27 order the testimony of such witness be taken by deposition  
 28 and that any designated book, paper, document, record,  
 recording, or other material not privileged, be produced at the  
 same time and place.

(Emphasis added). The rule, by its very terms, contemplates the use of the depositions at trial if the witness is in fact unavailable.

1       A defendant's right to a face-to-face meeting with witnesses appearing before the  
 2 trier of fact is not absolute. *United States v. Medjuck*, 156 F.3d 916, 919 (9th Cir. 1998).  
 3 In *Medjuck* the defendant was charged for his participation in an international conspiracy  
 4 to import 70 tons of hashish from Pakistan to Canada and the United States. The Ninth  
 5 Circuit affirmed the trial court's decision to admit, over Medjuck's objection, videotaped  
 6 testimony of two Canadian witnesses. *Medjuck*, 156 F.3d at 917-18. *Medjuck* is  
 7 indistinguishable from this case. When the government is unable to obtain the presence  
 8 of a witness at trial, "Rule 15 is not violated by the admission of the videotaped testimony  
 9 so long as the government makes diligent efforts to secure the defendant's physical  
 10 presence at the deposition and, failing this, employs procedures that are adequate to allow  
 11 the defendant to take an active role in the deposition proceedings." *Medjuck*, 156 F.3d at  
 12 920.

13       In *Medjuck*, where Canadian witnesses were not available for trial and were  
 14 beyond the subpoena power of the United States, the government set up an elaborate  
 15 system to allow Medjuck to remain in the United States, to witness the depositions in  
 16 Canada by live video-feed, and to participate with his attorneys in Canada by private  
 17 telephone during each of the depositions. In the instant case, the government employed  
 18 the same or similar procedures as those approved by the *Medjuck* court.

19       The government has made, and is continuing to make, every effort to secure the in  
 20 person appearance of both witnesses, including threats. However, if they chose not to  
 21 appear, there is little the government can do in short order to compel their attendance.  
 22 The U.S. Marshal's service cannot execute a bench warrant in Canada. The Canadian  
 23 government has no legal means to compel a Canadian citizen to travel to this country to  
 24 testify against his or her will, although as to Tsoukalas it may be a breach of the  
 25 conditions of his parole if he refuses to cooperate.

26       Practically speaking, the only way to force defendants to come to the  
 27 United States, if one or both witnesses fails to appear, is for the government to move to  
 28 withdraw from the plea agreements, and likely seek to charge one or both defendants with

1 more serious offenses related to their conduct. The government would then be in the  
2 position of having to extradite both men from Canada to face those charges. Obviously,  
3 that is likely to be a long, drawn-out process at best.

4 **IV. CONCLUSION**

5 The government anticipates, and hopes, that both witnesses will appear at trial. If  
6 they do not, the Court should allow their videotaped depositions in lieu of their live  
7 testimony.

8 DATED this 28th day of March, 2008.

9 Respectfully submitted,

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1                   CERTIFICATE OF SERVICE  
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I hereby certify that on May 28, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

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